APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CRIMINAL No. 5356

UNITED STATES OF AMERICA, *Plaintiff,*

v.

HAROLD JAMES JENKS, *Defendant,*

March 5, 1974

This cause comes on to be considered pursuant to the motion of defendant herein to suppress certain evidence seized pursuant to a search warrant which was based on an affidavit allegedly violating the standards required for such affidavits by the Fourth Amendment to the Federal Constitution. See, F.R. Cr. P. 41(e).

The defendant has been criminally charged under a two count indictment alleging that he violated 18 U.S.C. § § 922(j), 914(a), and 2314. The precise question for the Court to consider at this time is whether the affidavit on which the search warrant in the present case was based set forth sufficient facts to establish probable case for belief that the search warrant in question should issue. The concern of course, is whether the warrant was issued pursuant to the neutral and detached judgment of a judicial officer (here the U.S. Magistrate), as opposed to a perfunctory approval of the request of a law enforcement officer. The defendant in this case strives mightily to bring his motion to suppress under the strict terms of the pronouncement of the United States Supreme Court in the case of *Aguilar* v. *Texas, 378 U.S. 108 (1964),* as expatiated upon in *Spinelli* v. *U.S. 393 U.S. 410 (1969).* The affidavit complained of contains the following wording:

> "That he has reason to believe that on the premises known as the John G. Jinks residence, consisting of a white two

story frame residence with a grey roof and having the numbers 1131 displayed on the front of the building. Being further located at 1311 Beaumont Street, Dayton, Montgomery County, Ohio, including all outbuildings and appurtenances thereto, in the Southern Judicial District of Ohio there is now being concealed certain property, namely a large number of stolen firearms which were stolen in the State of Tennessee, being a collection of Winchester Brand, Commerative lever action rifles and several other rifles and pistols of the World War II vintage, further described as consisting of two .30-30 Winchester rifles, Model 94 with serial numbers of 21404 and 21816 which are possessed and stored in violation of Section 922(j), Title 18, U.S.C.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On Thursday, September 27, 1973, I was contacted by a confidential informer who has proven to be reliable in the past two months on three (3) separate occasions. On two of these occasions this informer furnished information which resulted in the seizure of illegal weapons. Said informer reported to me that there is now being concealed a large number of stolen firearms being stored at the above described location and that these firearms are now for sale as "Hot" guns (Stolen firearms). The informer further reports that the firearms are allegedly stolen from the Tennessee area, and that these guns are primarily Winchester Lever Action rifles.

My investigation into this matter led me to contact Special Agent Grant McGarity, Knoxville, Tennessee. Special Agent McGarity informed me that there had been a large collection consisting of over 300 firearms stolen from the Knoxville area on Sept. 26, 1973 and that this collection consisted of Commerative (sic) models. I have obtained serial numbers of some of these firearms from Special Agent McGarity.

I have been adivsed that John G. Jinks has a reputation of dealing in stolen merchandise and firearms by Detective Dick Walley, Dayton, Police Dept."

This Court of course is bound by the holdings of the Supreme Court in the *Aguilar* and *Spinelli* cases. But it must be remembered that in both of these cases the Supreme Court was faced with two extremely under-developed affidavits

which purported to establish "probably cause" sufficient to enable a detached magistrate to objectively determine that search warrants should issue. The Court ruled that evidence seized pursuant to warrants based on such affidavits had to be suppressed.

Defendant argues that the two-pronged test for the sufficiency of a search warrant affidavit, as outlined in *Spinelli* v. *U.S., 393 U.S. at 413,* was not met in this case. However, since the result in Spinelli is expressly based on and an outgrowth of *Aguilar* v. *Texeas, supra,* the question of whether this is an *Aguilar* type case is the logically prior issue before the Court, for in *Spinelli* it was said that:

> "If the tip [of the government informer] is found inadequate under *Aguilar* the other allegations which corroborate the information contained in the hearsay report should then be considered." (brackets added), 393 U.S. at 415.

The threshold question for this Court to consider is therefore, "When are the strict standards enumciated in *Aguilar*, as expatiated upon in *Spinelli*, applicable to Fourth Amendment scrutiny of a search warrant affidavit?" The Supreme Court clearly answered this most pertinent question in *U.S.* v. *Harris, 401 U.S. 573 (1971):*

> "The Court of Appeals relied on Aguilar v. Texas . . . in which we held that an affidavit based *solely on the hearsay report of an unidentified informant* must set forth some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'." 403 U.S. at 576 (emphasis added) see also, U.S. v. Ventresca, 380 U.S. 102 (1965).

Thus, the *Aguilar-Spinelli* test applied only when the clearly narrow instance of an affidavit based "solely on the hearsay report of an unidentified informant" is before the Court. Such is not the present case. In addition to "the hearsay report of an unidentified informant", the present affidavit established at least that the officer in question had specific personal knowledge that a large number of firearms had been stolen from the Knoxville, Tennessee area, that the of-

ficer knew the serial numbers of some of these firearms, that the officer had been advised as to certain particulars by contacts with federal law enforcement officers in Knoxville, Tennessee and a local officer in Dayton, Ohio, which led him to seek a search warrant and further that the Dayton, Ohio police officer had related that a person located at the residence here in question had a reputation for dealing in stolen firearms. Surely, this comprises more than the narrow reliance on an "unidentified informer" which was severely circumscribed in *Aguilar*. Just as surely, the legal standards traditionally required for the issuance of a search warrant were met in this case. The *Aguilar-Spinelli* test is simply in opposite here.

Assuming, *arguendo*, that the two-pronged *Aguilar-Sepinelli* test did apply herein, the Court is of the opinion that the present affidavid would satisfy it. The two-pronged test would require that if the warrant is based (entirely, which is not so here) on the hearsay report of unidentified informants that: 1) the affidavit must set forth "underlying circumstances" sufficient to enable the magistrate to independently adjudge the validity of the informant's conclusion, and, 2) that the affiant officer's support their claim that their informant was 'credible' or his information 'reliable.' See, *Spinelli* v. *U.S., 393 U.S. at 413.* The first prong of this test must be satisfied only if the 'tip' of the unidentified informant is the *sole* basis of the affidavit, *U.S.* v. *Harris, supra, at 576,* which was clearly not the case here. Even if the "tip" did fail the *Aguilar-Spinelli* test, then the corroborative allegations in the affidavit would have to be considered, *Spinelli* v. *U.S., supra, at 415,* and those corroborations in the present affidavit would clearly justify a neutral magistrate in the issuance of a warrant. The first prong of the test is thus met, or the necessity for meeting it obviated, in the present case. The second prong of the test, that the informant was credible or reliable, is even more surely met in this case. The law enforcement officer stated that the informant had furnished correct information on three occasions in the last two months. Two of these occasions had concerned illegal firearms. (This case concerns

illegal firearms). The informer said the guns were for sale. The agent had independent knowledge of this. The informant said the guns were from Tennessee. The agent had independent knowledge of this. The informer said the guns were "Winchester type rifles." The agent had independent knowledge of this. Surely, only a derelict agent (indeed a derelict magistrate) would find such a "tip" unreliable or incredible. Thus, even though the *Aguilar-Spinelli* test does not apply to this case, it is satisfied even if it does.

Defendants should be aware of the narrow parameters of the *Aguilar-Spinelli* test. The exclusionary rule does not crash down like a steel trap on the hands of law enforcers just because they make use of "unidentified confidential informers." To such a facile taxonomy, Fourth Amendment values do not lend themselves.

Wherefore, it is the judgment of this Court that the motion of defendant herein to suppress the evidence seized by the search warrant in question should be and the same hereby is OVERRULED.

S/Carl A. Weinman

JUDGE, U.S. DISTRICT COURT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2250

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

HAROLD JAMES JENKS, *Defendant-Appellant*

Filed March 25, 1975

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges.

This is a direct appeal of appellant's conviction on one count for transporting stolen firearms, in violation of 18 U.S.C. § 922(j). Appellant was found guilty by a jury and sentenced to six years imprisonment.

Six issues are presented on appeal: (1) Whether the court erred in overruling appellant's motion to suppress evidence obtained by an allegedly illegal search and seizure; (2) Whether the court erred in overruling appellant's motion for acquittal; (3) Whether the court erred in instructing the jury that the guns in question were "firearms" within the meaning of 18 U.S.C. § 922(j) and in its instructions with reference to the statute's interstate commerce requirement; (4) Whether the sentence imposed by the court is void as being in excess of the maximum provided by law; (5) Whether the court erred in overruling appellant's motion for a mistrial based on alleged misconduct on the part of the United States Attorney during the presentation of the government's closing argument; and (6) Whether the court erred in overruling defendant's motion to dismiss the indictment.

Upon consideration, we are of the opinion that the affidavit upon which the search warrant in this case was issued sufficiently established the requisite probable cause and that

the district court was therefore correct in denying appellant's motion to suppress. *Aguilar* v. *Texas*, 378 U.S. 108 (1964), *Spinelli* v. *United States*, 393 U.S. 410 (1969).

We are further compelled to conclude that the government met its burden of proof as to the firearms being part of an interstate transportation by establishing that the guns had been stolen from New Tazewell, Tennessee, on September 24, 1973 and found in a garage at 1131 Beaumont, Dayton, Ohio, on October 2, 1973. *United States* v. *Craven*, 478 F. 2d 1329 (6th Cir. 1973).

We find no error in the judge's instructions to the jury that the guns seized were "firearms" within the meaning of the statute. The record shows that the government's witnesses described the guns as firearms and other evidence was to the same effect. This evidence was not objected to nor controverted by the appellant and consequently there was no disputed issue of fact for the jury.[1]

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[1]The term "firearm" as used in § 922(j) is defined by § 921(a)(3) as follows:

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler of firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

The term "antique firearm" as used in § 921(a)(3) is defined by § 921(a)(16) as follows:

(16) The term "antique firearm" means—

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) any replica of any firearm described in subparagraph (A) if such replica—

[1](Continued)

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

The single remaining issue raised which merits discussion is that of an excessive sentence. It is clear that the case must be remanded on this question as the district court sentenced appellant to six years while the maximum term for a violation of § 922(j) is five years as prescribed by 18 U.S.C. § 924(a).

The judgment of the district court is therefore affirmed in all respects except as to the sentence imposed which is hereby vacated as being in excess of the statutory maximum. The action is remanded to the district court for resentencing the appellant in conformity with 18 U.S.C. §§ 922(j) and 924(a).

ENTERED BY ORDER OF THE COURT

John P. Helman, *Clerk*

No evidence was offered at trial that the guns fell within the statutory exception of "antique firearms." We are of the opinion that the burden of proof to establish the exception rested upon the defendant and that proof that the firearms were not "antique firearms" was not an essential ingredient of the government's case. It is well settled that one who relies on an exception in a statute has the burden to establish it. *McKelvey* v. *United States*, 260 U.S. 353 (1922); *United States* v. *Chodor*, 479 F. 2d 661 (1st Cir. 1973).